Supreme Court, U.S.
FILED
JAN 27 1992
OFFICE OF THE CLERK

No. 91-1221

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHAN G. KOONCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a court from convicting and sentencing a defendant for conduct for which the defendant has never been charged, solely because the conduct was considered in determining the defendant's sentence on a previous, separate conviction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	14
Appendix A	1a
Appendix B	22a
Appendix C	28a
Appendix D	38a

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977)	4
Blockburger v. *United States*, 284 U.S. 299 (1932)	8
Gryger v. *Burke*, 334 U.S. 728 (1948)	10
Payne v. *Tennessee*, 111 S. Ct. 2597 (1991)	10
Sekou v. *Blackburn*, 796 F.2d 108 (5th Cir. 1986)	11, 12
United States v. *Carey*, 943 F.2d 44 (11th Cir. 1991), petition for cert. pending, No. 91-6524	10, 12
United States v. *Garcia*, 919 F.2d 881 (3d Cir. 1990)	7, 10, 11
United States v. *Mack*, 938 F.2d 678 (6th Cir. 1991)	7, 10, 11, 12
United States v. *Troxell*, 887 F.2d 830 (7th Cir. 1989)	11
United States v. *Williams*, 935 F.2d 1531 (8th Cir. 1991), petitions for cert. pending, Nos. 91-6377 & 91-6455	7, 10, 11, 12
Williams v. *New York*, 337 U.S. 241 (1949)	10
Williams v. *Oklahoma*, 358 U.S. 576 (1959)	9, 13

Constitution, statutes and rules: Page

U.S. Const.:
Amend. V (Double Jeopardy Clause) ..... *passim*
Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.* 12
18 U.S.C. 922(g) 4, 7-8
21 U.S.C. 841(a)(1) 2, 3-4
21 U.S.C. 841(b)(1) (Supp. V 1987) 3
21 U.S.C. 841(b)(1)(A)(viii) 3
21 U.S.C. 841(b)(1)(C) (Supp. V 1987) 3
21 U.S.C. 841(b)(1)(D) 14
21 U.S.C. 846 2
28 U.S.C. 1291 4
Sentencing Guidelines:
§ 1B1.3(a)(2) 12
§ 2D1.1 (Oct. 1987) 3, 5
§ 2D1.1(b)(1) 3, 7
§ 2D1.1(c) 3, 5
§ 2K2.1(a) (Oct. 1987) 5
§ 5G1.3 13
§ 5G1.3(b) 13

In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA, PETITIONER

v.

STEPHAN G. KOONCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 945 F.2d 1145. An earlier opinion of the court of appeals (App., *infra*, 22a-27a) is reported at 885 F.2d 720. A related opinion of the United States Court of Appeals for the Eighth Circuit (App., *infra*, 28a-37a), is reported at 884 F.2d 349.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1991. A timely petition for rehearing was denied on November 15, 1991. App., *infra*,

38a-39a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

1. As the result of an investigation into methamphetamine trafficking in Minnesota, an informant named Darryl Petschen identified respondent as a supplier of methamphetamine and agreed to arrange a purchase of methamphetamine from respondent. Petschen made a series of tape-recorded telephone calls to respondent at his residence in Monticello, Utah, asking respondent to mail methamphetamine to him in Sioux Falls, South Dakota. In accordance with the arrangements, a package containing 443 grams of methamphetamine was mailed to Sioux Falls, South Dakota, in February 1988. Law enforcement officials subsequently obtained a search warrant and searched respondent's Utah residence, where they found an additional 963 grams of methamphetamine, as well as a number of firearms. App., *infra*, 2a-3a, 29a-30a.

2. Based on his conduct in mailing the package into South Dakota, respondent was convicted in the United States District Court for the District of South Dakota on one count of attempted distribution and distribution of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and 846. In determining that the appropriate base offense level for that offense under the Sentencing Guidelines was 34, the trial court considered both the 443 grams in the package and the

963 grams found at respondent's Utah home.[1] The trial court then adjusted respondent's offense level upward by two levels based on his possession of the firearms found in the search of his home. See Sentencing Guidelines § 2D1.1(b)(1). That offense level resulted in a Guidelines sentencing range for respondent of 235 to 293 months' imprisonment. Believing that the statutory maximum term of imprisonment was 240 months, the court sentenced respondent to 240 months' imprisonment, as well as a five-year term of supervised release. App., *infra*, 3a-4a, 32a, 34a n.7, 37a n.9.[2] The Eighth Circuit affirmed. *Id.* at 28a-37a (*Koonce I*).

3. The government secured a second indictment against respondent in the United States District Court for the District of Utah, charging him with possession of methamphetamine, in violation of 21 U.S.C.

---

[1] The trial court also considered other methamphetamine sold by respondent to Petschen during the preceding year, arriving at a total of 7869 grams of methamphetamine. Pursuant to the Drug Equivalency Table set forth in Sentencing Guidelines § 2D1.1 (Oct. 1987), that amount was treated as the equivalent of 15,738 grams of cocaine. Under the Drug Quantity Table set forth in Sentencing Guidelines § 2D1.1(c), that quantity resulted in a base offense level of 34. See App., *infra*, 32a & n.4, 34a n.7.

[2] Under 21 U.S.C. 841(b)(1) (Supp. V 1987), the maximum sentence for possession of methamphetamine with intent to distribute it was 20 years, unless the defendant had a prior felony conviction for a drug offense. See 21 U.S.C. 841(b)(1)(C) (Supp. V 1987). Although the government was not aware of it at the time, respondent in fact had a prior felony drug conviction, see App., *infra*, 20a n.11, so the maximum sentence actually was 30 years. See 21 U.S.C. 841(b)(1)(C) (Supp. V 1987). Under current law, the maximum sentence for respondent's crime would be life imprisonment. See 21 U.S.C. 841(b)(1)(A)(viii).

841(a)(1), and possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g). That indictment was based on the items found in the search of respondent's residence in Utah. After his conviction and sentencing in South Dakota, respondent filed a motion to dismiss the Utah indictment, contending that the Utah prosecution violated the Double Jeopardy Clause. After the district court denied the motion, respondent took an interlocutory appeal to the court of appeals.[3] See App., *infra*, 4a, 23a.

The court of appeals rejected respondent's claim. App., *infra*, 22a-27a (*Koonce II*). First, it concluded that the prosecution did not violate the ban on multiple prosecutions for the same offense because the Utah indictment charged an offense different from the offense for which respondent was prosecuted and convicted in South Dakota. The court explained that the South Dakota prosecution did not constitute a prosecution for the Utah conduct, because "at no time was [respondent] in jeopardy for the Utah offense. Rather, [respondent] was only 'in jeopardy' of receiving a harsher sentence for the South Dakota offense than he otherwise would have received." *Id.* at 25a.[4] Second, the court declined to address respondent's claim that the second indictment subjected him to multiple punishments, concluding that such a

---

[3] See *Abney* v. *United States*, 431 U.S. 651, 656-662 (1977) (holding that an order denying a motion to dismiss an indictment challenged under the Double Jeopardy Clause is final for purposes of 28 U.S.C. 1291).

[4] Judge McKay dissented, arguing that consideration of the Utah conduct at the South Dakota sentencing hearing effectively constituted a "trial of the merits" of the Utah conduct, and thus that a subsequent trial would violate the Double Jeopardy Clause. App., *infra*, 26a-27a.

claim would not be ripe until respondent was sentenced in the Utah case. *Id.* at 26a.

4. In the district court, respondent was found guilty on both charges. The district court sentenced respondent within the applicable Guidelines ranges, imposing concurrent sentences of 97 months' imprisonment on the drug charge [5] and 12 months' imprisonment on the firearms charge.[6] That sentence was set to be served concurrently with the twenty-year prison term imposed by the South Dakota court. Respondent also was sentenced to a six-year term of supervised release, to be served concurrently with the five-year term of supervised release imposed by the South Dakota court. The court rejected respondent's contention that the Double Jeopardy Clause barred imposition of a prison sentence for conduct already considered by the South Dakota court in determining the sentence for the South Dakota offense. App., *infra*, 4a-5a, 16a n.9.

---

[5] The court calculated respondent's base offense level on the basis of the 963 grams of methamphetamine found at the house, which was treated as 1.926 kilograms of cocaine pursuant to the Drug Equivalency Tables set forth in Sentencing Guidelines § 2D1.1 (Oct. 1987). Pursuant to the Drug Quantity Table set forth in Sentencing Guidelines § 2D1.1(c), that amount resulted in a base offense level of 26, which subjected respondent to a sentencing range of 78 to 97 months' imprisonment. The presentence report did not rely on the methamphetamine involved in the South Dakota conviction in calculating respondent's base offense offense level; the government has not challenged that determination. See Gov't C.A. Br. 10-11.

[6] Under Sentencing Guidelines § 2K2.1(a) (Oct. 1987), respondent's base offense level on the firearms charge was 9, which subjected respondent to a sentencing range of 8 to 14 months. See Gov't C.A. Br. 11.

5. The court of appeals reversed, holding that the conviction and sentence on the drug count violated the Double Jeopardy Clause. App., *infra*, 1a-21a. In the court's view, a two-step analysis was appropriate to determine whether respondent could be prosecuted in Utah for conduct that had been considered for sentencing purposes by the South Dakota court: first, the court considered whether respondent was "punished" for the Utah conduct in the South Dakota sentencing proceeding; second, the court considered whether Congress intended the result reached by the district court. *Id.* at 6a.

a. On the first point, the court concluded that the South Dakota court punished respondent for the Utah conduct because the Utah conduct affected the sentence respondent received in the South Dakota trial. App., *infra*, 7a-8a. The court noted that the South Dakota sentencing procedure was required by the Sentencing Guidelines, *id.* at 8a-9a, but nevertheless concluded that the subsequent trial and punishment in Utah constituted double punishment that would violate the Double Jeopardy Clause unless Congress intended such a result. *Id.* at 9a.

b. The court concluded that Congress did not intend to permit successive prosecution and punishment for conduct that had been considered at sentencing in a prior case. App., *infra*, 9a-15a. The court stated that, under the Sentencing Guidelines, respondent would have received the same sentence in the South Dakota court if he had been charged with both offenses, rather than just the South Dakota offense. *Id.* at 12a-13a. The court then concluded that "[i]t is difficult to believe that Congress would have intended the punishment to be larger if the government chose to proceed with two different proceedings." *Id.*

at 13a. Accordingly, the court held that the Double Jeopardy Clause prohibited the conviction and sentence imposed in the Utah prosecution, because the government does not "have any legitimate purpose in prosecuting an accused in a separate proceeding when the accused has already received an enhanced punishment in an earlier proceeding for the same conduct." *Id.* at 19a n.10.

Finally, the court rejected the government's claim that decisions of the Third, Sixth, and Eighth Circuits required the opposite result. App., *infra*, 14a-15a.[7] The court contended that those cases were distinguishable, because "none involved punishment for conduct that was previously aggregated into a defendant's base offense level for a related crime." *Id.* at 14a.[8]

---

[7] See *United States* v. *Mack*, 938 F.2d 678, 679-681 (6th Cir. 1991) (stating that the Double Jeopardy Clause does not bar imposition of a conviction and sentence for conduct used in a prior proceeding to determine the appropriate sentence within the Guidelines range); *United States* v. *Williams*, 935 F.2d 1531, 1539 (8th Cir. 1991) (stating that the Double Jeopardy Clause does not bar imposition of a conviction and sentence for conduct used in a prior proceeding to adjust the base offense level), petitions for cert. pending, Nos. 91-6377 & 91-6455; *United States* v. *Garcia*, 919 F.2d 881, 886 (3d Cir. 1990) (stating that the Double Jeopardy Clause does not bar imposition of a conviction and sentence for conduct used in a prior proceeding to adjust the base offense level or to determine the appropriate sentence within the Guidelines range).

[8] The court rejected respondent's argument that the sentence on the firearm count associated with the Utah offense was invalid because his possession of firearms had been taken into account in determining his sentence on the South Dakota offense. The court's analysis (following a line of reasoning that was not advanced by the government) rested on the conclusion that Sentencing Guidelines § 2D1.1(b)(1) and Section

6. The court of appeals denied the government's petition for rehearing and suggestion for rehearing en banc. Judge Baldock voted to grant rehearing en banc. App., *infra*, 38a-39a.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important question of constitutional law in a way that conflicts with decisions of this Court and a number of courts of appeals. Because the decision significantly affects courts' sentencing authority in cases in which multiple prosecutions are brought against the same defendant, the decision merits plenary review by this Court.

1. The court of appeals held that respondent was punished twice for his conduct in Utah, because the judge in the South Dakota case considered the Utah conduct for sentencing purposes, and respondent subsequently was prosecuted for the same conduct in Utah. That holding is fundamentally in error. Because the consideration of information at sentencing does not constitute a charge that puts a defendant in "jeopardy" for an "offence" within the meaning of the Double Jeopardy Clause, the Clause is not implicated by the consideration of information at sentencing. In the South Dakota prosecution, respondent was never in jeopardy for his Utah conduct; his

---

922(g) do not punish the same conduct, because each requires proof of an element not required by the other. Compare *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Both require possession of a firearm; the Guidelines enhancement provision requires possession during the course of the crime, while Section 922(g) does not; and Section 922(g) requires that the firearm be possessed by a felon, while the Guideline does not. See App., *infra*, 19a-20a.

prosecution for that conduct in Utah therefore did not expose him to a second jeopardy for the same offense.

The court of appeals' ruling in this case is flatly inconsistent with this Court's decision in *Williams* v. *Oklahoma*, 358 U.S. 576 (1959). *Williams* involved a kidnaping that ended in the victim's death. First, Williams was charged with murder in the county where the death occurred. He pleaded guilty and was sentenced to life imprisonment. Subsequently, Williams was charged with kidnaping in the county where the kidnaping occurred. Again, he pleaded guilty. The court then sentenced Williams to death, explicitly relying upon the murder as a basis for the sentence. In the Supreme Court, Williams, like respondent in the court of appeals, contended that the court's reliance on the murder in sentencing on the kidnaping charge violated the Double Jeopardy Clause because it "punished him a second time for the same offense." 358 U.S. at 584. The Court disagreed:

> [M]urder and kidnaping are not the same offense in Oklahoma. * * * It is not contended that the charge of murder * * * made any reference to the crime of kidnaping, and the charge involved in this case made no reference to the murder. * * * [I]n view of the obvious fact that, under the law of Oklahoma, kidnaping is a separate crime, entirely distinct from the crime of murder, the court's consideration of the murder as a circumstance involved in the kidnaping crime cannot be said to have resulted in punishing respondent a second time for the same offense.

Id. at 584-586. In sum, a court does not punish an offender for uncharged conduct when it takes that

conduct into account at sentencing. Rather, the court is merely imposing a sentence based on an appropriate consideration of all the pertinent circumstances, including the full pattern of the defendant's conduct. See *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948) ("The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."); see also *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2606-2608 (1991) (noting the importance of allowing sentencer to evaluate total harm caused by the crime); *Williams* v. *New York*, 337 U.S. 241, 246-248 (1949) (noting the importance of allowing sentencer to evaluate defendant's past criminal acts).

2. Applying these principles, six circuits have concluded—contrary to the reasoning of the court below—that consideration of particular conduct at an earlier sentencing proceeding does not bar separate conviction and punishment for that conduct.[9] Three cir-

---

[9] See, *e.g.*, *United States* v. *Carey*, 943 F.2d 44, 46 n.4 (11th Cir. 1991) ("Enhancement of a sentence based on criminal conduct other than that underlying the instant conviction * * * is not considered 'punishment' for that conduct in the double jeopardy context because the court is sentencing the defendant only for the instant offense."), petition for cert. pending, No. 91-6524: *United States* v. *Mack*, 938 F.2d at 679 (stating that the prohibition against double jeopardy "is not implicated when a defendant is indicted for an incident of conduct previously used to increase the length of his sentence for a separate offense"); *United States* v. *Williams*, 935 F.2d at 1538 ("Although the court in the [earlier] case inquired into the [later] offense during the sentencing hearing, at no time was Williams put 'in jeopardy' for the [later offense] until the actual trial for the [later offense]."); *United States* v. *Garcia*, 919 F.2d at 886 ("consideration of a prior bad act at sentencing will not ordinarily

cuits also have found the converse to be true, namely that an earlier conviction does not bar consideration of the conduct at a later sentencing proceeding.[10] The contrary conclusion of the court of appeals in this case cannot be reconciled with this Court's decisions or with the consistent course of decisions by other courts of appeals.

The court of appeals argued that its decision did not conflict with the decisions of the other courts of appeals because none of those cases involved prosecution and punishment for conduct that previously was used to determine a defendant's base offense level. See App., *infra*, 14a-15a. As a description of the facts of the other cases, this distinction is accurate, but the court of appeals failed to explain why the distinction should make a difference for double jeopardy purposes. If the Double Jeopardy Clause is not im-

---

create a double jeopardy bar to a later prosecution for that bad act"); *United States* v. *Troxell*, 887 F.2d 830, 836 (7th Cir. 1989) ("Mere mention of a bad act in sentencing for a crime does not amount to attachment of jeopardy for that act."); *Sekou* v. *Blackburn*, 796 F.2d 108, 111 (5th Cir. 1986) ("Consideration of criminal conduct as an aggravating circumstance does not convert the sentencing proceeding into a trial, conviction, or punishment for the criminal activity so considered.").

[10] See, *e.g.*, *United States* v. *Mack*, 938 F.2d at 681 ("[a]n enhanced sentence because of a prior conviction is no more double jeopardy than is a consideration of other relevant conduct"); *United States* v. *Williams*, 935 F.2d at 1539 ("we see no difference in enhancing a defendant's criminal history category on the basis of conduct which *has not yet* resulted in a criminal conviction and enhancing a criminal history category on the basis of conduct which *has already* resulted in a criminal conviction"); *United States* v. *Garcia*, 919 F.2d at 886 ("The consideration at sentencing of prior convictions has long been held not to violate double jeopardy.").

plicated by a conviction and punishment for conduct that was considered at sentencing in an earlier case, it cannot be relevant whether the consideration was totally unguided, as it was in pre-Guidelines cases,[11] or was used to make adjustments of base offense levels,[12] or was used to determine where to fix the defendant's sentence within a particular Guidelines range.[13] Despite the protestations of the court of appeals, the court's analysis calls into question the results of all these cases. The reach of the Double Jeopardy Clause does not turn on such fine distinctions within statutory sentencing schemes.

The court of appeals also argued that its reasoning rested on Congress's intent in authorizing the creation of a sentencing guidelines system, because the court found it "difficult to believe that Congress" could have intended to allow the government to conduct separate trials for related crimes. App., *infra*, 13a. In fact, however, there is no basis in the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, or elsewhere for the court's supposition about Congress's intent. Moreover, there is nothing in the Sentencing Guidelines that suggests that multiple prosecution and punishment of the sort that occurred in this case is improper.

As the court of appeals acknowledged (App., *infra*, 8a), the Sentencing Guidelines require that the sentencing court in each case determine the offense level for sentencing purposes on the basis of "all such acts and omissions that were part of the same course of conduct." Sentencing Guidelines § 1B1.3(a)(2).

---

[11] See, *e.g.*, *Sekou* v. *Blackburn*, 796 F.2d at 111.

[12] See, *e.g.*, *United States* v. *Williams*, 935 F.2d at 1538; *United States* v. *Carey*, 943 F.2d at 46 n.4.

[13] See *United States* v. *Mack*, 938 F.2d at 679-681.

Moreover, the Guidelines specifically contemplate that related offenses will sometimes result in multiple prosecutions. Section 5G1.3 of the Guidelines acknowledges that prospect by establishing the principle that the sentence for a subsequent conviction for a related offense ordinarily should result in a combined sentence equal to the sentence that would have been imposed if all the sentences had been imposed at the same time. Sentencing Guidelines § 5G1.3(b).

What the court of appeals has done is to express its own discomfort with what it regards as "double counting" of the Utah conduct, and to convert that discomfort into a constitutional rule and a conclusion as to legislative intent. But the Utah conduct has not been "double counted" in any improper manner. Although the Utah conduct was used in the South Dakota prosecution to determine the appropriate sentence in that case, respondent was not charged with any Utah crimes in the South Dakota prosecution. No constitutional rule required the government to treat the South Dakota sentencing proceeding as completely satisfying respondent's liability for his Utah crimes. That is the principle this Court embraced in *Williams* v. *Oklahoma*, *supra*, and neither Congress nor the Sentencing Commission has indicated any intention to disallow such a practice.

3. If the decision of the court of appeals remains unreviewed, it will have serious adverse consequences. Under the court's ruling, the government would never be able to prosecute a defendant for conduct that was considered at a previous sentencing proceeding. See App., *infra*, 18a n.10 ("[T]he government will no longer have any legitimate purpose in prosecuting an accused in a separate proceeding

when the accused has already received an enhanced punishment in an earlier proceeding for the same conduct."). That would make it impossible for the government to seek an adequate punishment for a course of criminal conduct if the first conviction were for a relatively minor offense with a low maximum sentence. For example, a defendant convicted of trafficking in a small amount of marijuana (under 50 kilograms) would be subject under 21 U.S.C. 841(b)(1)(D) to a maximum sentence of only five years' imprisonment. If the district court imposing the sentence considered information regarding uncharged conduct that would have merited (or even required) a much longer sentence, no court following the analysis of the court of appeals could subsequently convict and punish the defendant for such conduct. Because the court of appeals' ruling makes novel and unsound double jeopardy law, and because that ruling could have a significant and troubling impact on federal and state criminal practice, the decision of the court of appeals in this case warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

JANUARY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-4081

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STEPHEN G. KOONCE, DEFENDANT-APPELLANT

Sept. 23, 1991

Before SEYMOUR and EBEL, Circuit Judges, and BROWN, Senior District Judge.*

EBEL, Circuit Judge.

This case presents two issues. First, we must decide whether the Double Jeopardy Clause (U.S. Const. amend. V), prohibits the conviction and imposition of a sentence for possession of a controlled substance where the same possession was used in a prior narcotics proceeding to increase the defendant's sentence

---

* The Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

under the United States Sentencing Guidelines. We hold that the Double Jeopardy Clause prohibits the subsequent conviction and sentence. Second, we must decide whether the Double Jeopardy Clause prohibits the imposition of a sentence for being a felon in possession of firearms where possession of the same firearms during commission of a narcotics offense was used to enhance the defendant's sentence in a prior narcotics proceeding under the United States Sentencing Guidelines. We hold that the Double Jeopardy Clause does not preclude this subsequent conviction and sentence.

FACTS

The defendant-appellant, Stephen Koonce, ran a methamphetamine distribution operation out of his Monticello, Utah residence. In late 1987, one of Koonce's customers, Darryl Petschen, pled guilty to charges of illegally distributing methamphetamine. Petschen named Koonce as his supplier and offered to help South Dakota and Minnesota authorities apprehend Koonce. Petschen made a series of tape recorded telephone calls to Koonce in Monticello requesting that Koonce sell him methamphetamine. Petschen then sent a letter to Koonce requesting that a quantity of methamphetamine be mailed to a designated post office box in Sioux Falls, South Dakota.

A package containing 443 grams of methamphetamine arrived at the post office box on February 4, 1988. Koonce's fingerprints were found on the outer wrappings of the package. Shortly thereafter, law enforcement officials obtained a warrant to search Koonce's residence. The authorities executed the warrant and discovered Petschen's letter to Koonce, a large number of firearms, and an additional 963

grams of methamphetamine stored in Koonce's freezer.

Koonce was charged in the United States District Court for the District of South Dakota with one count of distributing an unspecified amount of methamphetamine under 21 U.S.C. §§ 841(a)(1) and 846 (1988).[1] The jury found Koonce guilty of distributing the 443 grams he had mailed to the Sioux Falls post office box. However, when the district court calculated his sentence under the United States Sentencing Guidelines, it took into account two additional quantities of methamphetamines: (1) the 963 grams discovered in his house in Monticello, and (2) 6,463 grams Petschen testified he had purchased from Koonce during the year prior to Koonce's arrest.[2] Thus, Koonce's South Dakota sentence was based upon his distributing a total of 7,869 grams of methamphetamine. The court calculated Koonce's initial offense level as 34 under U.S.S.G. § 2D1.1(a)(3) (1988) by referencing a total weight of 15,738 grams of cocaine.[3] After adding a two level enhancement for possessing firearms during the commission of the

---

[1] Unless otherwise specified, citations to the United States Code and the Sentencing Guidelines refer to the provisions in effect at the date of Koonce's South Dakota trial in 1988.

[2] Petschen testified that he had received twenty to thirty pounds of methamphetamine during this time; however, the court considered only 6,463 grams (14.22 pounds) for purposes of sentencing.

[3] Under the sentencing guidelines, the penalty is based upon the number of grams of cocaine involved, and thus, the methamphetamine had to be converted to an equivalent amount of cocaine by referencing an equivalency table.

The South Dakota district court's calculation was affirmed in *United States v. Koonce*, 884 F.2d 349, 352-53 (8th Cir. 1989).

offense and calculating Koonce's criminal history as a level III, the South Dakota district court found that the appropriate sentencing range under the Guidelines was 235 to 293 months. The district court sentenced him to 240 months imprisonment, the statutory maximum under 21 U.S.C. § 841(b). In addition, the court sentenced Koonce to serve five years of supervised release following the completion of his twenty-year prison term. Finally, the court fined Koonce $50,000. The Eighth Circuit Court of Appeals affirmed Koonce's conviction and sentence on appeal. *United States v. Koonce*, 884 F.2d 349 (8th Cir.1989) (*Koonce I*).

The United States then decided to charge and prosecute Koonce in the United States District Court for the District of Utah for possession with intent to distribute the 963 grams of methamphetamine found at his Monticello residence under 21 U.S.C. § 841(a). In addition, Koonce was charged with being a felon in possession of numerous firearms under 18 U.S.C. § 922(g). Koonce immediately objected, arguing that the Double Jeopardy Clause protected him from being tried in the Utah district court for distributing the 963 grams of methamphetamine and for possessing the firearms. The district court refused to dismiss the indictment against him, and we affirmed. *United States v. Koonce*, 885 F.2d 720, 722 (10th Cir. 1989) (*Koonce II*). We held that because Koonce had not been *charged* in South Dakota for any crime stemming from the 963 grams of methamphetamine discovered in his Monticello residence, or for possessing the firearms, the Double Jeopardy Clause's ban against multiple prosecutions was not implicated. *Id.* Further, we agreed with the government that because Koonce had not yet been found guilty of the Utah offense—let alone punished—his claim based upon

the Double Jeopardy Clause's ban against multiple punishments was not yet ripe for review. *Id.* The case was remanded back to the district court for trial.

The Utah district court found Koonce guilty on the methamphetamine possession charge as well as on the felon in possession of a firearm charge. On the methamphetamine count, the district court sentenced him to a term of ninety-seven months to be served concurently with his South Dakota sentence on firearms charge, the court sentenced Koonce to a twelve month concurrent sentence. In addition, Koonce was sentenced to six years of supervised release to run concurrently with the five years of supervised release already imposed by the South Dakota court. At the time of sentencing, Koonce again raised his Double Jeopardy claims. The district court again dismissed this claim, and Koonce appealed. The issue being ripe for review, Koonce's appeal is before us a second time.

DISCUSSION

There are two components of the Double Jeopardy Clause: the first protects against a subsequent prossecution for the same offense after either an acquittal or a conviction (the prosecution component), while the second protects against multiple punishments for the same offense (the punishment component). *See Grady v. Corbin*, —— U.S. ——, 110 S.Ct. 2084, 2090, 109 L.Ed.2d 548 (1990). Koonce's Double Jeopardy claim pertaining to the methamphetamine distribution charge implicates the punishment component of the Clause [4] and will be addressed in Part

---

[4] *Koonce II* rejected Koonce's claim of double prosecution because it held that the use of the Utah methamphetamines for sentencing purposes in the South Dakota case did not

I of this opinion. The gravamen of Koonce's Double Jeopardy claim pertaining to the firearms charge is based upon the prosecution component of the Clause and will be addressed in Part II of this opinion.

I.

We employ a three-step analysis to determine the validity of Koonce's claim that the methamphetamine distribution sentence imposed by the Utah district court violated the punishment component of the Double Jeopardy Clause. We determine first whether, for purposes of the Double Jeopardy Clause, Koonce was punished in South Dakota for the methamphetamine found at his Monticello residence. Second, we determine whether Congress intended that an accused in Koonce's position should receive cumulative sentences from two separate proceedings where both sentences punish the accused for the exact same conduct. Third, we determine whether the punishment imposed by the Utah district court constitutes double punishment under the Double Jeopardy Clause where the sentence imposed runs concurrently with his South Dakota sentence.

A. The South Dakota Punishment—We begin with the language of the relevant constitutional provision: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend V. The text of the Clause prohibits double *prosecution* where each prosecution places the defendant in jeopardy of receiving punishment for the same offense. However, in addition to providing explicit protection against double prosecution, the

---

amount to a prosecution for that conduct. 885 F.2d at 722. That ruling is not only binding precedent in the Tenth Circuit but is also res judicata as to Koonce.

Clause further prohibits the government from *punishing* its citizens twice for the same offense. *Grady*, 110 S.Ct. at 2090; *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173, 21 L.Ed. 872 (1873) ("It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution."); *see also* Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 266 n.13 (1965) ("It is clear that preventing multiple punishment for the same offense was foremost in the minds of the framers of the double jeopardy clause. . . . Until joinder became permissible and commonplace, however, multiple punishment could only result from multiple trials."). The protection from double prosecution would certainly be a hollow one if the government were constitutionally permitted to develop a scheme to punish a person twice for the same conduct just so long as it did not subject him to two trials:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.
> . . .
> . . . .
> The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial.

Ex parte Lange, 85 U.S. (18 Wall.) at 168-69.

When the South Dakota district court sentenced Koonce, it punished him not only for distributing the methamphetamine that he mailed to Sioux Falls, but

it also punished him for the 963 grams of methamphetamine discovered at his Monticello residence:

> In determining the base offense level, the [South Dakota] district court found that the methamphetamine weight should include . . . that seized in the search of Koonce's Utah home (963 grams). . . . The court considered the methamphetamine seized in Utah . . . because it found "that the distribution of methamphetamine by Mr. Koonce was satisfactorily established by a preponderance of the evidence to be a continuing enterprise with Mr. Petschen."

Koonce I, 884 F.2d at 352 (footnote omitted). Had the South Dakota Court not factored the 963 grams of methamphetamine discovered in Koonce's Monticello residence into its sentencing calculation, it would have calculated Koonce's initial offense level at level 32.[5] After applying the two level upward adjustment for possessing a firearm, the final level would have been 34, which would have subjected Koonce to a range of 188 to 235 months as opposed to the 235 to 293 month range he was actually sentenced under in the South Dakota district court.

The South Dakota district court in punishing Koonce for the Utah methamphetamine was simply following the mandate of the United States Sentencing Guidelines, which requires that an accused be punished for "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3 (a)(2). According to the guideline commentary, this

---

[5] The converted cocaine equivalent of the methamphetamine, exclusive of the amount discovered at Koonce's residence, would have fallen between 5 and 14.9 kilograms corresponding to a base offense level of 32. *See, supra*, n. 3 & accompanying text.

aggregation is applicable even if a particular amount is not charged: "[I]n a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." *Id.*, Commentary, Background ¶ 3; *see id.* Commentary, Application Note 2. The Sentencing Guideline approach to punishing defendants for conduct not charged in the indictment represents the guideline's "real offense" approach to drug crimes based upon the proposition that the amount of punishment inflicted on an accused should depend upon what really transpired as opposed to what was charged. *See id.* Ch. 1, Pt. A.4(a); *see also id.* § 1B1.3, Commentary, Application Note 2 (Nov. 1990):

> For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales.

In both the Utah proceeding and the South Dakota proceeding, defendant was punished for the exact same conduct, the possession of Utah methamphetamine with intent to distribute. Absent evidence that Congress intended such double punishment, this runs afoul of the Double Jeopardy Clause.

B. Congressional Intent—The next step in our analysis is to determine whether Congress *intended* an accused in Koonce's position to be subjected to two punishments, one based upon an increase in the base offense level to reflect an additional quantity of drugs

not subject to the first prosecution and the other derived from a separate conviction and sentence based upon the defendant's possession of the same drugs used to enhance the first sentence. This is critical because the punishment component of the Double Jeopardy Clause is driven by legislative intent. If Congress did intend multiple punishments for a single act, then for purposes of Double Jeopardy analysis the combined punishment would simply be viewed as the appropriate punishment determined by Congress to represent the gravity of the offense and it would be upheld. *See Garrett v. United States*, 471 U.S. 773, 779, 105 S.Ct. 2407, 2411, 85 L.Ed.2d 764 (1985) ("There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and *punishing also the completed transaction.*" (quotation omitted) (emphasis in the original)).[6] Because Congress has the ultimate authority to determine the appropriate penalty for an offense, a court may not reject that penalty unless it violates the Eighth Amendment prohibition against cruel and unusual punishment. *See Ohio v. Johnson*, 467 U.S. 493, 499 n. 8, 104 S.Ct. 2536, 2541 n. 8, 81 L.Ed.2d 425 (1984) (noting that even where the offenses share identical elements, "if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end"). However, once Congress has determined the appropriate punishment for an offense, the government is prohibited from imposing the penalty on the accused more than once. *See Brown v. Ohio*, 432 U.S. 161, 165, 97

---

[6] Of course, while Congress may legitimately intend that the punishments be cumulative, Congress's ability to subject an accused to multiple *prosecutions* in order to arrive at the punishments is controlled by the prosecution component of the Double Jeopardy Clause. *See, infra,* Part II.

S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense. . . .").

Absent evidence to the contrary, it is assumed "that Congress ordinarily does not intend to punish the same offense under two different statutes." *Ball v. United States*, 470 U.S. 856, 861, 105 S.Ct. 1668, 1671, 84 L.Ed.2d 740 (1985). In the instant case, there is no evidence that Congress intended that an individual who distributes a controlled substance should receive punishment both from an increase in the offense level under the Guidelines in one proceeding and from a conviction and sentence based on the same conduct in a separate proceeding.

We find strong support in the Sentencing Guidelines that Congress intended for quantities of illicit drugs to be aggregated into one punishment, rather than broken down into separate offenses and punished separately. One of the aims of the Guidelines is to stop prosecutors from manipulating the counts charged in an indictment, thereby abusing the sentencing process. *See* U.S.S.G. Ch. 1, Pt. A.4(a) ("[T]he Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation."). To this end, the Guidelines provided for the "grouping" of certain offense conduct—particularly conduct involving narcotics violations—into a single punishment. *Id.* § 1B1.3, Commentary, Background ¶ 4 (§ 3D1.2(d), which provides for grouping of multiple [narcotics] counts . . . prevents double counting").[7]

---

[7] The Guidelines provide for "grouping" in two different categories of offenses: those in which the offense level is

Under U.S.S.G. § 3D1.1(a), "[w]hen a defendant has been convicted of more than one count, the court shall . . . [g]roup the counts resulting in conviction into distinct Groups of Closely-Related Counts ("Groups") by applying the rules specified in § 3D1.2." Under U.S.S.G. § 3D1.2(b), counts are grouped together "[w]hen the offense level is determined largely on the basis of . . . the quantity of a substance involved. . . ." The list of offenses mentioned in U.S.S.G. § 3D1.2(d) includes distribution of narcotics covered by U.S.S.G. § 2D1.1. Finally, U.S.S.G. § 3D1.3(b) states that in cases where the counts are grouped together under U.S.S.G. § 3D1.2 (d), "the offense level applicable to a Group is the offense level corresponding to the aggregated quantity. . . ." This "grouping" procedure assures that an accused who is charged and convicted of several narcotics counts in one proceeding, all stemming from the "same course of conduct or common scheme or plan," will receive the same sentence he would have received had he been charged and convicted of one narcotics count based on the same facts.

Thus, under the Guidelines, had the government charged Koonce in the South Dakota district court with two separate counts—one based upon the methamphetamine mailed to Sioux Falls and one based upon the methamphetamine found in Monticello—he

---

based "primarily on the . . . quantity of substance involved (*e.g.*, drug trafficking . . .)" (fungible offenses), and offenses that involve different but "closely interrelated" harms (nonfungible offenses). U.S.S.G. Ch. 3, Pt. D, Introductory Commentary. The aggregation procedure for narcotics violations applicable in Koonce's case is limited to fungible offenses. We therefore do not address the Double Jeopardy implications of grouping nonfungible offenses.

would have received a sentence identical to the one that was imposed in the South Dakota prosecution based upon the single count of mailing methamphetamine to Sioux Falls. It is difficult to believe that Congress would have intended the punishment to be larger if the government chose to proceed with two different proceedings (counting the Monticello drugs in both proceedings—once for purposes of sentence enhancement and once for purposes of punishment for the second conviction) than if it chose to consolidate all of the counts in one proceeding. The protections against prosecutorial charge manipulation strongly suggests that Congress did not intend such a result.[8]

---

[8] It has been suggested by the government that one part of the Guidelines clearly evinces an intent to punish twice for the same crime: The Guidelines specify that a "criminal history category" is to be applied in determining the sentence applicable to any given offense level, and the criminal history category clearly considers a defendant's prior criminal conduct for which he has already been punished once. U.S.S.G. § 1B1.1(f)-(g). We have no difficulty in drawing a distinction between the criminal history category and the offense level category. As discussed, *infra*, the punishment component of the Double Jeopardy Clause permits Congress to punish twice for the same conduct if it evinces a clear desire to do so. The Guidelines draw a clear distinction between using previously punished conduct to establish "criminal history" and using it to establish the "offense level." In the "criminal history" area, the previously punished conduct is used only to determine the "likelihood of recidivism and future criminal behavior. . . ." *Id.* Ch. 4, Pt. A, Introductory Commentary. There is nothing inconsistent, however, in Congress's intent to consider prior criminal history to determine a defendant's character and need for punishment and Congress's intent that all related offenses be punished as a single offense rather than allowing the prosecutor to bifurcate

The government, in its letter of supplemental authority, cites several cases which have upheld conviction and punishment for conduct that was previously used under the Guidelines to enhance the offender's sentence for other conduct. *United States v. Mack*, 938 F.2d 678 (6th Cir.1991); *United States v. Williams*, 935 F.2d 1531 (8th Cir.1991); *United States v. Garcia*, 919 F.2d 881 (3d Cir.1990). These cases, however, are distinguishable, as none involved punishment for conduct that was previously aggregated into a defendant's base offense level for a related crime.

In *Mack* the defendant appears to have been sentenced toward the high end of a guideline range as a result of a failure to appear for sentencing, for which he was later indicted. 938 F.2d at 679. His offense level, however, and hence his sentencing range, were not increased as a result of his failure to appear.

Similarly, in *Garcia* there was no evidence that the defendant's base offense level in his first trial (for July and August 1988 drug counts) had been increased as a result of the conduct for which he was subsequently prosecuted (a June 1988 drug count). Interestingly, the court declined to rule on the issue now before us when it stated: "Use of the quantity of drugs in the alleged June transaction to calculate the base offense level for the July and August transaction poses a distinct issue, but one that is unnecessary to decide in this case." 919 F.2d at 887.

---

the offenses to obtain a larger cumulative punishment. *Id.* Ch. 3, Pt. D, Introductory Commentary (The purpose of the Guidelines cumulative approach is "to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct.").

In *Williams* as well, the defendant's subsequently indicted offense conduct (jury tampering) was not aggregated with his initial offense conduct (selling pledged collateral) to compute his base offense level under the Guidelines (although his jury tampering conduct was used to adjust that level upward for obstruction of justice under Chapter 3 of the Guidelines). In any event, the court in that case vacated both sentences and remanded for a single sentence consistent with the Guidelines grouping procedure. Hence, the defendant would be punished only for the offense carrying the highest offense level, but not for both offenses. 935 F.2d at 1539. He was therefore not punished twice for jury tampering.

The government also cites *United States v. Farmigoni*, 934 F.2d 63 (5th Cir.1991). This was a pre-Guidelines case, however, and is therefore not indicative of Congress's intent under the Guidelines. Additionally, the holding in that case was unrelated to sentence enhancement: the court simply held that under *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), two distinct crimes, rather than one, had been committed, and thus the Double Jeopardy Clause did not prevent two prosecutions, convictions, and punishments. 934 F.2d at 65.

In sum, the government has pointed to no authority that has held that Congress intended, in the Guidelines, to punish a defendant a second time for conduct that has previously been aggregated into the base offense level for a related sentence in an earlier prosecution. To the contrary, as we have pointed out above, there is substantial evidence that the Guidelines procedure for aggregating fungible offense conduct was intended to prevent exactly this type of double punishment.

C. Concurrent Versus Consecutive—The final question we address is whether the sentence imposed by the Utah district court violates the punishment component of the Double Jeopardy Clause even though the sentence runs concurrently with the South Dakota sentence.[9] We hold that under *Ball* it does.

In *Ball*, the defendant-petitioner, an ex-felon, had been indicted and convicted in the United States District Court for the Western District of Virginia of two firearm felonies—felon in receipt of a firearm and felon in possession of a firearm. The district court sentenced the petitioner to consecutive prison terms for the two convictions: three years on the receipt of a firearm count under 18 U.S.C. §§ 922 (h)(1) and 924(a) (1982); and two years on the possession count under 18 U.S.C.App. § 1202(a)(1) (1982). The petitioner appealed the sentences. The government conceded that both counts rested on the same conduct and that, therefore, consecutive sentences could not be imposed. The Fourth Circuit accepted the government's concession and remanded the case to the district court instructing it to make the sentences concurrent. The petitioner, still not satisfied, petitioned for certiorari to the Supreme Court. The Supreme Court granted the petition and reversed the Court of Appeals, instructing the district court to vacate one of the sentences. *Id.* 470 U.S. at 865, 105 S.Ct. at 1673.

---

[9] The sentence Koonce received in Utah is not completely concurrent with the South Dakota sentence because he received six years of supervised release as opposed to the five years he received from the South Dakota court. Because we hold that even a totally concurrent sentence would violate the punishment component of the Clause, we need not address whether the one extra year of supervised release by itself violates the punishment component of the Clause.

The Supreme Court rejected the argument that because one of the sentences ran concurrently with the other, the Double Jeopardy Clause was not implicated: "One of the convictions, as well as its concurrent sentence, is authorized punishment for a separate offense. . . . The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence." *Id.* at 864-65, 105 S.Ct. at 1673-74. The Court based its decision on the practical consequences that follow from a conviction including the potential for an increased sentence under a recidivist statute, possible delays in parole eligibility, and the societal stigma that results from the conviction itself. *Id.* at 865, 105 S.Ct. at 1673. In the Court's view these consequences by themselves amounted to a punishment for double jeopardy purposes even though the incarceration time was concurrent to another sentence: "[T]he second conviction, even if it results in no greater sentence, is an impermissible punishment." *Id.* We note that another consequence of a concurrent sentence is that where an accused manages to avoid one of his sentences through collateral attack, he may still not be released because of a concurrent sentence stemming from the duplicative count. All of the preceding consequences flow from the additional conviction, not from the imposition of additional prison sentences or fines. *Ball*, therefore, defines punishment to include all of the consequences that flow from a conviction without limiting the concept of punishment to incarceration time, fines, and other penalties and restraints explicitly ordered by the court. It follows, in the present case, that the absence of an additional prison sentence does not render the second conviction constitutional.

Similarly, in *Ex parte Lange*, the petitioner had received two sentences and one conviction. The petitioner had been sentenced to one year's imprisonment and ordered to pay a two hundred dollar fine pursuant to a statute that provided that an accused could receive *either* a maximum of a one year sentence *or* a two hundred dollar fine but not both. The court, realizing its error, vacated the accused's sentence and resentenced him to a year in prison without crediting him for the time already served on the previous one year sentence. The Supreme Court reversed the new sentence on the grounds that he had already paid the two hundred dollar fine and had also served five days imprisonment on this first sentence. Thus, he could not now be resentenced to an additional year because that would represent double punishment for the same offense, even though it did not stem from a separate conviction. 85 U.S. (18 Wall.) at 175. The same logic bars Koonce's conviction and punishment by the Utah district court for a crime stemming from possession of methamphetamine, following the imposition of the convictionless first punishment by the South Dakota district court for his possession of the same drugs. The simple fact is that Koonce was punished by the South Dakota court for the methamphetamine found in Monticello and that he was punished again for the same conduct in the Utah district court by virtue of the fact that he was convicted for possessing the Utah methamphetamine with intent to distribute. Under the Double Jeopardy Clause and *Ball*, Koonce's right to be free from double punishment was violated.[10]

---

[10] As a result of this holding, the government will no longer have any legitimate purpose in prosecuting an accused in a separate proceeding when the accused has already received an

II.

We now turn to the issue of whether Koonce's conviction in the Utah district court for being a felon in possession of a firearm under 18 U.S.C. § 922(g) violates the Double Jeopardy Clause where he had already received an enhanced punishment under the Sentencing Guidelines in the South Dakota district proceeding for possession of the same firearms. We begin by noting that the punishment component of the Double Jeopardy Clause was not triggered. The Utah and South Dakota district courts did not punish Koonce for the same offense, as the same offense is defined under *Blockburger*. 284 U.S. at 304, 52 S.Ct. at 182 ("[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). The two key elements under U.S.S.G. § 2D1.1(b)(1), the firearm sentencing enhancement, are (1) that the accused be in possession of the firearm, and (2) that the possession be during the commission of the narcotics offense. *See* U.S.S.G. § 2D1.1(b)(1). The key elements under 18 U.S.C. § 922(g), charged in the Utah proceeding, are (1) that the accused possessed a firearm, and (2) that the accused was a felon when he possessed the firearm. Although both require proof of possession of a firearm, U.S.S.G. § 2D1.1(b)(1) requires proof that the firearm was possessed by the accused during the commission of

---

enhanced punishment in an earlier proceeding for the same conduct under the Sentencing Guidelines. Even though the second *prosecution* is not technically barred by the Double Jeopardy Clause under *Koonce II*, any additional *punishment*, including any conviction, would be barred in the second prosecution. Thus, there would not appear to be any valid reason to pursue the second prosecution.

the drug offense, while 18 U.S.C. § 922(g) requires proof that the accused was a felon at the time he possessed the firearm.[11] Therefore, under *Blockburger*, we cannot hold that the Utah district court violated the *punishment* component of the Double Jeopardy Clause when it sentenced him for violating 18 U.S.C. § 922(g).

Koonce argues in the alternative that the government violated the *prosecution* component of the Double Jeopardy Clause by bringing the 18 U.S.C. § 922 charge in Utah when he had already been prosecuted for the same conduct in South Dakota pursuant to U.S.S.G. § 2D1.1(b)(1). We previously rejected this claim, in *Koonce II*, 885 F.2d at 722, and that ruling is res judicata here. In *Koonce II*, we held that use of related criminal conduct to enhance another sentence pursuant to the Sentencing Guidelines is not equivalent to a prosecution for such related conduct. 885 F.2d at 722. Thus Koonce has faced only one prosecution for that offense and that was in the Utah prosecution.

CONCLUSION

We hold that the Utah district court's conviction and imposition of a ninety-seven month sentence for distributing the methamphetamine found at Koonce's Monticello residence violated the Double Jeopardy

---

[11] We note that in proving its case under 18 U.S.C. § 922(g) in the Utah district court, the prosecution relied on two prior felony convictions to establish that Koonce was a felon when he possessed the firearms in Monticello. The first was a possession of a controlled substance felony of which Koonce was convicted in California in 1975. The second was a sexual offense felony of which Koonce was convicted in Minnesota in 1978.

Clause. We hold that conviction and imposition of a sentence for the firearms charge did not violate the Double Jeopardy Clause. Thus, we AFFIRM the conviction and sentence for the firearms charges and we REVERSE the district court and REMAND with instructions that it VACATE the narcotics conviction and sentence imposed under 21 U.S.C. § 841(a)(1).

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 89-4013

UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE

v.

STEPHEN G. KOONCE,
DEFENDANT-APPELLANT

Sept. 25, 1989

Before McKAY, TACHA, and EBEL, Circuit Judges.

EBEL, Circuit Judge.

This appeal raises the issue of whether the government, consistent with the Double Jeopardy Clause and the federal sentencing guidelines, can prosecute a defendant for a crime even though evidence concerning defendant's commission of that crime already has been used to enhance defendant's sentence for an earlier offense. We hold that the government can do so.[1]

---

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would

Defendant Stephen G. Koonce challenges the district court's denial of his motion to dismiss a federal indictment against him in Utah. The Utah indictment stems from defendant's alleged possession of 963 grams of methamphetamine and various firearms, which federal agents found in defendant's Utah home while conducting a search pursuant to a warrant. Defendant previously was convicted in the United States District Court for the District of South Dakota of distributing 443 grams of methamphetamine by mailing a package containing the methamphetamine to a prospective buyer in South Dakota. During the sentencing hearing for the South Dakota offense, the government presented evidence about the alleged Utah offense and other crimes that defendant allegedly had perpetrated elsewhere. Relying upon the evidence of the other offenses, the South Dakota district court sentenced defendant to 20 years in prison for the South Dakota offense, which was the statutory maximum.

Defendant contends that the Utah prosecution violates the Double Jeopardy Clause (U.S. Const., amend. 5) and the federal sentencing guidelines (18 U.S.C.A. App.) because some of the alleged criminal misconduct underlying the Utah prosecution already has been used to enhance defendant's sentence for the prior conviction in South Dakota.

In response, the government argues that the Double Jeopardy Clause's ban on multiple *prosecutions* for the same offense is not implicated here because the Utah and South Dakota offenses are plainly different. The government further contends that "[n]othing in

---

not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a); 10th Cir. R. 34.1.9. Therefore, the cause is ordered submitted without oral argument.

the language of the [sentencing] guidelines or the commentary precludes a subsequent prosecution for conduct considered in determining the base offense level" of a different offense. (U.S.Br. at 17.) As for the Double Jeopardy Clause's ban on multiple *punishments* for the same offense and the guidelines' requirement that certain offenses be grouped together for sentencing purposes, the government contends that this case is not ripe for review. The government argues that defendant has not yet been sentenced (or even tried) for the Utah offense, and there is no way of knowing whether defendant will receive additional cumulative punishment for the Utah offense.[2]

---

[2] Although the government's brief on appeal generally avoids addressing the merits of the multiple-punishment issue, the government does analogize to our holding about enhanced sentences in *United States v. Vigil*, 818 F.2d 738 (10th Cir. 1987). In *Vigil*, we held that recidivist statutes, which impose enhanced sentences on repeat offenders, do not violate the Double Jeopardy Clause:

> The defendant is not punished a second time for the same offense; rather, the repetition of criminal conduct aggravates his guilt and justifies a heavier sentence upon again being convicted. . . .
>
> "Recidivist statutes have passed double jeopardy scrutiny because they work on the theory that 'the increased punishment does not represent punishment for the earlier crimes, but rather the fact of the earlier crimes aggravates the commission of the latest crime warranting imposition of the longer sentence.' [*United States v.*] *Bowdach*, 561 F.2d [1160, 1176 (5th Cir.1977)]. In other words, the underlying offense becomes a greater crime, worthy of greater punishment, when a recidivist commits it."

Vigil, 818 F.2d at 742 (quoting *United States v. Pleasant*, 730 F.2d 657, 662 (11th Cir.), *cert. denied*, 469 U.S. 869, 105 S.Ct. 216, 83 L.Ed.2d 146 (1984)). For the reasons stated below, we do not reach the multiple-punishment issue.

We agree with the government that defendant's *prosecution* for the Utah offense does not offend either the Double Jeopardy Clause or the sentencing guidelines. The Double Jeopardy Clause's ban on multiple prosecutions for the same offense is not implicated here because defendant is not now facing a trial in Utah for the same offense for which he previously has been convicted in South Dakota. The Utah offense and the South Dakota offense are different. *See Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) ("[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"). Moreover, defendant has not pointed us to anything in the language of the guidelines that precludes a defendant's subsequent prosecution for a different offense. Defendant's reference to the principle of lenity is not relevant in this context because defendant has not shown us any ambiguity in the guidelines concerning the government's right to prosecute fully a defendant accused of committing different offenses.

Nor do we agree with Judge McKay's dissent that defendant's South Dakota sentencing hearing constituted a prosecution for the Utah offense. Although the South Dakota district court inquired into the Utah offense during the sentencing hearing and made findings concerning it, at no time was defendant in jeopardy for the Utah offense. Rather, defendant was only "in jeopardy" of receiving a harsher sentence for the South Dakota offense than he otherwise would have received. Put another way, the Fifth Amendment prohibits a person from being "twice put in jeopardy of life or limb" for the "same offense," and defendant never was "put in jeopardy" for the Utah offense during the South Dakota sentencing hearing.

With regard to defendant's argument that he is subject to multiple *punishments* for the same offense in violation of the Double Jeopardy Clause and the sentencing guidelines, we agree with the government that the issue is not ripe for review. Defendant has not yet been convicted of the Utah offense and may never be. Unless and until defendant receives some punishment from the district court that is arguably multiple, the issue is not ripe for review.[3]

The district court's ruling that defendant's prosecution for the Utah offense does not offend either the Double Jeopardy Clause or the sentencing guidelines is AFFIRMED, and the case is REMANDED to the district court for trial. In all other respects, the appeal is DISMISSED.

McKAY, Circuit Judge, dissenting:

I believe the proposed trial in this case violates the first leg of Double Jeopardy protection, that is, multiple trials for the same offense. When the District Court for South Dakota conducted its "hearing" for the purpose of determining by a preponderance of evidence that the defendant committed this offense, that was a trial of the merits of whether he com-

---

[3] The government contends that defendant does not even have an argument that he has received multiple punishments for the Utah offense unless he is given a Utah sentence that runs consecutively to the South Dakota sentence or else is longer than it. In other words, the government asserts that if defendant ultimately receives a sentence for the Utah offense that runs concurrently to his South Dakota sentence and is less than or equal to it in length, then defendant cannot possibly have suffered any multiple punishment. Because defendant has not yet received any sentence for the Utah offense, we need not reach that issue.

mitted the offense. Even though the burdens of proof and sentencing purposes were different, what is now proposed is a second trial for precisely the same offense.

APPENDIX C

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 88-5361

UNITED STATES OF AMERICA, APPELLEE

v.

STEPHAN GERALD KOONCE, APPELLANT

Submitted May 9, 1989

Decided Aug. 29, 1989

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and BEAM, Circuit Judge.

LAY, Chief Judge.

Stephan Gerald Koonce (Koonce) was convicted on one count of unlawfully, knowingly, and intentionally distributing or causing to be distributed or attempting to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846 (1982). He was sentenced to twenty years' imprisonment with five years' supervised release and fined $50,000. This appeal followed.

Koonce appeals on several grounds: (1) there was insufficient evidence to sustain the guilty verdict; (2) the jury instructions regarding attempt were in er-

ror; (3) evidence of prior bad acts was erroneously admitted; (4) the Federal Sentencing Guidelines (Guidelines), 18 U.S.C. § 3551, *et seq.*, are unconstitutional; and (5) the Guidelines were improperly applied.

Facts

In the late 1980's, the Minnesota Bureau of Criminal Apprehension conducted an investigation of methamphetamine trafficking in that state. As a result of this investigation, Darryl Petschen was prosecuted and pled guilty to charges of illegally distributing methamphetamine. In November of 1987, Petschen agreed to identify his methamphetamine supplier. Petschen named Stephan Gerald Koonce as the supplier and agreed to arrange a methamphetamine purchase from Koonce. As a part of the set-up, Petschen made a series of tape-recorded phone calls to Koonce at his residence in Monticello, Utah. During the calls, Petschen asked Koonce to mail methamphetamine to him. Petschen also sent a letter to Koonce requesting that two pounds of methamphetamine be mailed to a designated post office box address in Sioux Falls, South Dakota, and that it be addressed to a "D.P. Olsen." In reality, the box had been rented by Duane Dahl, an agent for the South Dakota Division of Criminal Investigation.[1]

A package of methamphetamine arrived[2] at the Sioux Falls post office box as previously arranged, on February 4, 1988. The package was picked up by Dahl. The analysis of the package's contents revealed

---

[1] The tape-recorded phone calls occurred over a two month period of time. Petschen made the calls from the Washington County Sheriff's office in Stillwater, Minnesota.

[2] The package had been mailed from Cortez, Colorado, a town approximately 40 miles from Koonce's Utah home.

that it contained approximately one pound of D-methamphetamine. Koonce's fingerprints were found on the outer wrappings of the package.

Following the package's arrival, law enforcement officials obtained a search warrant for Koonce's Utah residence. On February 12, 1988, the search warrant was executed. An additional 963 grams of methamphetamine were found during the search. Petschen's letter to Koonce was also discovered in Koonce's briefcase and a large number of firearms was found.

We find no merit to the substantive challenges to Koonce's conviction. First, regarding the sufficiency of the evidence necessary to sustain Koonce's conviction, we must view the evidence in the light most favorable to the verdict, accepting all reasonable inferences that logically arise. *See United States v. Matlock*, 773 F.2d 227, 229 (8th Cir.1985) (citing *United States v. Grego*, 724 F.2d 701, 704 (8th Cir.1984)). Some of the evidence supporting the inferences of guilt includes: Koonce's fingerprint found on the Sioux Falls methamphetamine package, the multiple tape recordings referring to prior and pending drug deals between the two, Petschen's letter requesting Koonce to send methamphetamine to him under the name D.P. Olsen at the particular Sioux Falls post office box, and the fact that the package *was* sent to the name at that address. Further, the Government corroborated many of Petschen's statements, and thus, the jury was entitled to credit Petschen's testimony. We find that despite the fact that no one actually observed Koonce mailing the package, there was sufficient circumstantial evidence to sustain the conviction. Second, taking the jury instructions as a whole, we find that no prejudicial error resulted. *See United States v. Varner*, 748 F.2d 925, 927 (4th Cir.1984). Third, under Federal Rule

of Evidence 404(b) evidence of other bad acts is "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, [or] identity, * * *." As the challenged evidence (the 963 grams of methamphetamine seized at Koonce's Utah residence) arguably concerned knowledge, intent and identity, we thus cannot say that in admitting this evidence, the trial court abused its broad discretion. *See United States v. Lanier*, 838 F.2d 281, 285 (8th Cir.1988).

Koonce also raises two challenges to the Federal Sentencing Guidelines, 18 U.S.C. § 3551, *et seq.* Koonce's constitutional objections have been foreclosed by the Supreme Court's ruling in *Mistretta v. United States*, —— U.S. ——, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Koonce also asserts that the district court misapplied the Guidelines in determining his ultimate sentence. We deal seriatim with his objections.

The Guidelines provide:

> [t]he conduct that is relevant to determining the applicable guidelines range includes * * * all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, *or that otherwise were in furtherance* of that offense.

Guideline § 1B1.3(a)(1) (emphasis added). The Guidelines § 1B1.3(a)(2) also states that: "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction" shall be considered as conduct "rele-

vant to determining the applicable guideline range[.]" In determining the base offense level, the district court found that the methamphetamine weight should include (1) that found in the package mailed to Sioux Falls (443 grams); (2) that seized in the search of Koonce's Utah home (963 grams); and (3) a portion of the total weight [3] of methamphetamine which Petschen testified he had received from Koonce during the year prior to Koonce's arrest (6,463 grams). The court considered the methamphetamine seized in Utah and a portion of that testified about by Petschen because it found "that the distribution of methamphetamine by Mr. Koonce was satisfactorily established by a preponderance of the evidence to be a continuing enterprise with Mr. Petschen." There was evidence that Petschen's information had been corroborated and that he was considered by law enforcement officials to be reliable. Furthermore, Petschen's letter to Koonce (which was found in Koonce's briefcase during the execution of the search warrant) referred to a continuing enterprise between the two and to specific amounts of methamphetamine previously sold by Koonce to Petschen. We therefore find that the district court's calculation of the total weight of methamphetamine as 7,869 grams was not clearly erroneous. Accordingly, we affirm as to this finding.

Before the district court could calculate the base offense level, however, it was necessary to make a factual finding as to whether the methamphetamine was "Methamphetamine" (D- or Dextro-methamphetamine) or "L-Methamphetamine/Levo-methamphetamine." [4] Here, the Drug Enforcement Agency (DEA)

---

[3] Petschen had stated that approximately 20-30 pounds of methamphetamine had been dealt to him by Koonce.

[4] Sentencing Guideline § 2D1.1(a)(3) directs the sentencer to calculate the base offense level using the Drug Quantity

chemist had analyzed the methamphetamine in the Sioux Falls parcel as Dextro-methamphetamine. The laboratory analysis of the drugs seized at Koonce's Utah residence revealed that the substance was "methamphetamine." However, it was never tested further (than the generic "methamphetamine" (identification) as either Dextro- or Levo-. However, the methamphetamine involved in the previous Koonce-Petschen dealings (that which was referred to in the letter) was *never* tested. Nonetheless, there was testimony that the house search occurred just several days after the package had been mailed to Sioux Falls. This fact strengthens the inference that the methamphetamine may have all been originally part of the same parcel. Further, there was evidence, albeit hearsay, that a DEA chemist had told a Minnesota drug agent that he had never seen L-methamphetmine except in pharmaceutical cases. Sentencing transcript at 39. The trial court found that it was more likely that the methamphetamine was "methamphetamine" (or the Dextro-type).[5] The drug equivalency

---

Table, which is found within § 2D1.1. Using the Drug Equivalency Table within § 2D1.1, one gram of [Dextro-] Methamphetamine is equivalent to two grams of cocaine, where one gram of Levo-methamphetamine is equivalent to two-tenths of one gram of cocaine. The final sentence imposed therefore varies greatly depending upon the determination of the methamphetamine as levo- or dextro-methamphetamine.

[5] We think that the case at bar is not entirely unlike that in *United States v. Brett*, 872 F.2d 1365 (8th Cir.), *petition for cert. filed*, (June 23, 1989) (No. 88-7566). In that case, this court found that although only six of 82 packets were chemically analyzed, the court's inference that all of the drugs contained the same substance, was permissible. *Id.* at 1372. In the instant case, the evidence presented supported an inference of a close nexus between the methamphetamine found

tables of section 2D1.1 require the government to prove only that the drug was an illegal substance, namely, methamphetamine. The defendant did not raise the issue at trial;[6] it did so only at the sentencing hearing. We find that the government adequately carried its burden of proof that the illegal substance was that which is the commonly understood term and not a lesser derivative of the same. *Cf. United States v. Francesco*, 725 F.2d 817, 821 (1st Cir.1984) ("Although the government has the burden in a criminal case of proving every element of the offense charged, it has no burden of proving that a term used in its commonly understood sense has no other possible meaning—at least until the possibility of another meaning is raised by the defense."). The defense had ample opportunity to impeach the adequacy of that finding. Under the circumstances we find the district court's finding was not clearly erroneous.

On the basis of the total amount of [Dextro-]methamphetamine, the court calculated Koonce's base offense level at 36.[7]

---

at Koonce's Utah home and that in the Sioux Falls parcel. This further supports the district court's finding that all of the methamphetamine was of the Dextro-type.

[6] The defense elicited from the chemist that the Utah methamphetamine had not been tested further as to Dextro- or Levo-, but did not introdce any evidence to indicate that it *was* Levo-.

[7] *See* Sentencing Transcript at 56. The trial court may have misspoken and meant 34. According to the Drug Equivalency Tables in the Guidelines, the 7869 grams (total gram weight of the involved drugs as found by the trial court) is equivalent to the 15.738 kilograms of cocaine. Using this amount, the Drug Quantity Table indicates that a base offense level of 34 is appropriate. Although the court stated it was imposing a base offense level of 36, after it had announced it was

Koonce's final challenge to his sentence concerns the court's two-level enhancement for possession of a firearm. Guideline § 2D1.1(b)(1) states: "If a firearm or other dangerous weapon was possessed during commission of the offense, increase by 2 levels." The Application Notes provide further guidance:

> The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

Guidelines § 2D1.1 Application Note 3. We also reiterate that whether or not a gun was "present" (in the sense that it justified enhancement) is a factual determination. As such, we must affirm the district court if its finding is not clearly erroneous. Other courts have addressed this issue. In *United States v. Otero*, 868 F.2d 1412 (5th Cir.1989) enhancement for use or possession of a firearm was upheld. In that case, the defendant negotiated and completed a cocaine sale to an undercover agent. The sale occurred in the defendant's hotel room, where additional cocaine was found. Firearms were also found in the defendant's van. There, the court of appeals upheld "the court's factual conclusion that Otero construc-

---

assessing an additional two levels for possession of a firearm, the court stated that 36 was the proper offense level. We find that 34 was the proper level based on the methamphetamine amount. We address the enhancement for the firearm possession *infra*.

tively possessed a weapon during the commission of the offense [as it was] not clearly erroneous." *Id.* at 1415. *Cf. United States v. Hewin*, 877 F.2d 3 (5th Cir.1989); *United States v. White*, 875 F.2d 427 (4th Cir.1989); *United States v. Weidner*, 703 F.Supp. 1350 (N.D.Ind.1988). *Compare United States v. Vasquez*, 874 F.2d 250 (5th Cir.1989).

In the instant case, a large number of firearms was discovered during the search of Koonce's Utah residence. There were several loaded firearms found in Koonce's pickup truck in which was also found Koonce's briefcase. The court acknowledged that "[c]ertainly, there wasn't anyone present with Mr. Koonce at the time the drugs involved here were mailed and so there is certainly no way of knowing whether at that time he had in his possession a firearm." Sentencing Transcript at 57. The court continued: "It is the view of the Court in interpreting these Guidelines that it is the clear intention of the Guidelines to provide that any drug dealer who possesses firearms in connection with his drug affairs creates an additional hazard and that additional penalties should be proscribed therefor." *Id.* The district court thus allowed for a two-level enhancement of Koonce's sentence, to a 36. *Id.* at 58. We stress that the offense of conviction was the *distribution* (not merely the mailing of the package) of methamphetamine. Given that (1) tape similar to that found on the mailed parcel of methamphetamine was found in Koonce's bedroom; (2) Koonce's pickup truck had loaded firearms[8] in it; (3) Koonce's briefcase was

[8] This court has recognized that firearms are "tools of the [drug dealer's] trade," *see United States v. LaGuardia*, 774 F.2d 317, 320 (8th Cir.1985); *United States v. Milham*, 590 F.2d 717, 721 (8th Cir.1979).

also in the pickup (the briefcase also contained express mail receipts (similar to those that would have been detached from the parcel mailed to Sioux Falls) and Petschen's letter, referring to past drug deals between the two, and giving Koonce the Sioux Falls address to which the parcel was to be (and *was*) mailed). After considering this information, the trial court determined that it was not "clearly improbable" that the guns were connected with the offense. We cannot say that the district court's determination was clearly erroneous. We thus affirm the judgment of conviction and the sentence as rendered.[9]

Judgment affirmed.

---

[9] Although the trial court found that the appropriate Guideline range was 235 months to 293 months, Koonce was sentenced to 240 months' imprisonment, the statutory maximum. Sentencing Transcript at 59.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-4081

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STEPHEN G. KOONCE, DEFENDANT-APPELLANT

ORDER

Entered November 15, 1991

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges, and BROWN, District Judge.*

This matter comes on for consideration of appellee's petition for rehearing with suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

---

* Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied. Judge Baldock voted to grant the petition for en banc rehearing.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45272